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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 56

FEDERAL TRADE COMMISSION, *Petitioner*

v.

SUN OIL COMPANY, *Respondent*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR RESPONDENT

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# INDEX


| | Page |
|---|---|
| Question Presented | 1 |
| Statute Involved | 2 |
| Statement | 2 |
| Summary of Argument | 9 |
| Argument | 16 |
| I. As Construed by the Court Below the Proviso Carries Out the Discernible Legislative Purpose in Harmony With This Court's Interpretation of Section 2 of the Clayton Act and With the Broad Policy of the Antitrust Laws | 16 |
| II. The Choice of the Court Below Between Divergent Interpretations of the Proviso and the Court's Application of the Proviso to This Case Produce a Result in This Case Consistent With Law and the Economic Realities | 41 |
| Conclusion | 48 |


## CITATIONS

CASES:


| | |
|---|---|
| A. E. Staley Mfg. Co. v. Federal Trade Commission, 135 F. 2d 453 (C.A. 7) | 34 |
| Allen-Bradley Local No. 1111 v. Wisconsin Employment Board, 315 U.S. 440 | 41 |
| American Cooperative Serum Association v. Anchor Serum Co., 153 F. 2d 907 (C.A. 7, 1946) cert. den. 329 U.S. 721 | 32 |
| American Oil Company, Docket No. 8183 (June 27, 1962) | 26, 39 |
| Anheuser-Busch, Inc., 54 F.T.C. 277 (1954) | 39 |
| Anheuser-Busch, Inc. v. Federal Trade Commission, 265 F. 2d 677 (C.A. 7, 1959) reversed 363 U.S. 536 | 25 |
| Atalanta Trading Corporation v. Federal Trade Commission, 258 F. 2d 365 (C.A. 2, 1958) | 36 |
| Atlantic Refining Co., Docket No. 7471 (1962) | 31 |

Page

Automatic Canteen Co. v. Federal Trade Commission, 346 U.S. 61 ..... 13, 35, 36, 37
Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356 (C.A. 9, 1955) cert. den. 350 U.S. 991 ..... 32
Barker Painting Co. v. Local 734, Brotherhood of Painters, 281 U.S. 462 ..... 41
E. Edelmann & Co., 51 F.T.C. 978 (1955) ..... 12, 27
Elizabeth Arden, Inc, v. Federal Trade Commission, 156 F. 2d 132 (C.A. 2, 1946) ..... 36
Enterprise Industries v. Texas Co., 240 F. 2d 457 (C.A. 2, 1957) ..... 21, 25, 29, 32, 42
Federal Trade Commission v. A. E. Staley Manufacturing Co., 324 U.S. 746 ..... 20, 37
Federal Trade Commission v. Anheuser-Busch Co., 363 U.S. 536 ..... 41
Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 ..... 14, 35
Federal Trade Commission v. Ruberoid Co., 343 U.S. 470 ..... 36
Gerber Products Co. v. Beech-Nut Life Savers, 160 F. Supp. 916 (S.D.N.Y. 1958) ..... 25, 32, 39
Grand Union Co. v. Federal Trade Commission, 300 F. 2d 92 (C.A. 2, 1962) ..... 36
Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F. 2d 234 (C.A. 2, 1929) cert. den. 279 U.S. 858 ..... 39
Schwegmann Bros. v. Calvert Corporation, 341 U.S. 284 37
Simpson v. Union Oil Co. of California, 1961 Trade Cases Par. 69,936 (N.D.Cal. 1960) ..... 31
Standard Oil Company v. Federal Trade Commission, 340 U.S. 231 ..... 10, 22, 33, 34, 36, 38, 48
Standard Oil Company of California v. United States, 337 U.S. 293 ..... 18, 30, 31
Sun Oil Company, Docket No. 6934 (1962) ..... 31
United States v. Borden Co., 370 U.S. 460 ..... 36
United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 ..... 41

STATUTES: Page

Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526:
Section 2(a), 15 U.S.C. 13(a) ..... 50
Section 2(b), 15 U.S.C. 13(b) ..... 50

MISCELLANEOUS:

Austin, *Price Discrimination and Related Problems Under The Robinson-Patman Act* (rev. ed. 1953) .. 30
80 Cong. Rec. 8235 ..... 30
80 Cong. Rec. 9418 ..... 28
80 Cong. Rec. 10745 ..... 30
De Chazeau & Kahn, *Integration and Competition* in The Petroleum Industry (1959) ..... 20
Federal Trade Commission, *Final Report on the Chain Store Investigation* (1934) p. 57 *et seq.* ..... 37
Gray, *Nature and Sources of the Law*, 2d ed. (1927) .. 33
H. Rep. No. 2287, 74th Cong. 2d Sess. ..... 30
Rowe, *Price Discrimination Under The Robinson-Patman Act* (1962) ..... 20
47 Va. L. Rev. 1229, Note ..... 29
62 Col. L. Rev. 171, Note ..... 29
66 Yale L. J. 935, Note ..... 29, 32
75 Harv. L. Rev. 429, Note ..... 29
1962 Duke L. J. 300, Note ..... 29

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## BRIEF FOR RESPONDENT

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### QUESTION PRESENTED

Respondent markets a branded gasoline in 21 states through independent dealers. The product competes with other branded gasoline including a private brand marketed by a chain retailer, Super Test Oil Company, at 19th and Pearl Streets, Jacksonville Florida. At that company operated station, its only Jacksonville

outlet among some 65 company operated stations, Super Test, over a period of months, cut prices and took custom from a Sunoco station at that intersection to such an extent that the Sunoco dealer threatened to go out of business unless he received price assistance. Respondent temporarily reduced its wholesale price to that one dealer, but not to its other dealers in Jacksonville, in order to meet the price raid on its own and its dealer's sales of gasoline. The question presented is whether respondent's temporary price reduction to the one dealer, made in self defense to protect their mutual business from a price raid, constituted a meeting of a competitor's lower price within the meaning of the "meeting competition" proviso of Section 2(b) of the amended Clayton Act.[1]

## STATUTE INVOLVED

The pertinent provisions of the statute are set forth in the appendix, *infra*, pp. 50-1.

## STATEMENT

Respondent refines gasoline and markets it in a large part of the United States. At the time of the events which present the issues before the Court, respondent marketed a single grade of gasoline, colored blue, and designated "Sunoco" (R. 352). In 1955 Gilbert McLean, one of Sun's thirty-eight retailer-dealers in

[1] As set forth in the brief for the Federal Trade Commission (Brief, p. 2), the Question Presented assumes that only the retailer customer of a supplier competes with other retail sellers for the business of motorists. Central to the question before the Court is the effect to be given to the competition between refiners and other marketers of branded gasoline, through service stations selling a single brand, for the business of the motoring public with whom they maintain continuous communication.

Jacksonville, Florida, operated a service station on the corner of 19th and Pearl Streets in Jacksonville. McLean leased his station from respondent. (R. 15). As the court below found, he was an independent contractor but, like virtually all gasoline dealers, he sold only the branded product of one supplier (R. 352). He bought gasoline from Sun Oil Company at 24.1 cents a gallon and sold it at 28.9 cents a gallon, then the competitive price in the Jacksonville area for comparable gasolines. Late in June 1955 Super Test Oil Company, a chain retailer of a private brand, opened a station across the street from McLean's station and began selling Super Test "regular" gasoline at 26.9 cents a gallon. The Super Test station was one of approximately sixty-five gasoline stations operated by Super Test Oil Company by station managers (R. 319). In August 1955 this single Super Test station in this area commenced a series of price cuts. Some of these price cuts were advertised in the local newspaper and all were advertised on curb signs (R. 353). On August 27 Super Test dropped its posted price to 21.9 cents a gallon and on August 28 dropped its price to 20.9 cents a gallon. Whenever Super Test cut its prices, McLean's sales of Sunoco gasoline declined substantially. As the court below states, Super Test, on a number of occasions, after reducing prices and gaining customers at McLean's expense, raised its price and reestablished the pre-existing two-cent price differential which had existed between its gasoline and Sunoco. On at least one occasion Super Test maintained its low price for a week (R. 353-4). In addition to its cut price Super Test gave trading stamps, which respondent's vice-president testified were evaluated at about one cent a gallon of gasoline (R. 281).

December 27, 1955, Sun gave a discount to McLean of 1.7 cents a gallon. Sun reached this decision, the court below found, after a study of gallonage records of its Jacksonville dealers and of a report from its regional manager, familiar with the local situation. This study led respondent to conclude that only McLean was affected adversely by Super Test's price-cuts, and that a price allowance could be made to McLean to put Sunoco on a competitive level with Super Test at 19th

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that he can do it and still make 3½ cents a gallon, no matter what the amount involved is?

The Witness: That would be the result of our policy.

Hearing Examiner Piper: And you would not turn him down?

The Witness: We might counsel with him and suggest that it was not necessary for him to go down there to meet that lower price and suggest that he try a higher price, but if he elected to go to the lower price we would give him 3½ cents.

Hearing Examiner Piper: Under certain conditions that might result in your selling him gasoline at a loss?

The Witness: Possibly for a time.

Hearing Examiner Piper: But still you would give him the allowance?

The Witness: Yes, Sir." (R. 284).

"Hearing Examiner Piper: That seems like a peculiar situation, if you have no control over the price the dealers post, and you have said it repeatedly, and yet you have a policy under which you in effect guarantee them a 3½ cent margin to operate on. Then they could pick out an artificially low price and because of your policy you have to follow them down and give them an allowance so that they would still have a 3½ cent margin of profit. That does not make sense.

The Witness: Mr. Piper, if I gave that impression then I was incorrect. If they pick an artificially low price we wouldn't recognize such a price and we would not put our policy into effect, but if it is what we consider legitimate actual competition, then we would put our dealers in position to meet that competition if they elected to do so." (R. 285).

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be forced out of business (R. 356).
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Pearl Streets to 21.9 (R. 356).
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d to be 28.9, the court below found
a short lull Super Test dropped
cLean told respondent's regional
he received some help from Sun
business (R. 356). He said he
e of 25.9 to meet the Super Test
olicy in price war situations wa-
electing to post a particular price,
argin of 3½ cents a gallon.[2] On

[2] Commission this price war policy is mis-
aste operating policy to squeeze dealers
rgin. See Brief, pp. 35, 40. There is no
l for this assertion. The testimony of
t, when read in its entire context on this
t *in price wars* Sun endeavored to ensure
ot less than a 3½ cent margin. Thus:

ized on 1.7 to give him 3.5?
ork that way. We had a rule at that
n margin we felt our dealers could exist
when a dealer comes to us and says, 'I
price to meet competition because I am
usiness,' then we figure from his posted
ideration our tankwagon price, what the
must be, or would have to be to afford
that margin of 3½ cents." (R. 278).

Piper: Do you want me to understand
decide to meet competition, no matter
petitive price, and that once he makes
l give him enough of an allowance so

and Peal Streets without adversely affecting any other Sun dealer in Jacksonville (R. 357).

Upon receiving the allowance of 1.7 cents a gallon McLean cut his price 3 cents to 25.9 cents, thereby absorbing 1.3 cents of the cut and reducing his normal gross profit from 4.8 cents to 3.5 cents.

The next day or one day thereafter, Super Test reduced its price to 23.9 cents. McLean maintained his price at 25.9 cents and kept it there until he went out of business (R. 356-7). This occurred on February 18, 1956, two days after a general price war broke out in Jacksonville.

The brief for the Commission states that this price war "followed" Sun's "discriminatory price cut" to McLean (Brief, p. 38). Elsewhere the brief suggests that the local price war at 19th and Pearl Streets "spread" on February 16 (Brief, p. 48). Hence we think it necessary to point out that the record does not show causal connection between the price assistance to McLean and the general price war of February 1956. Indeed, the court below pointed out that Super Test triggered the price war: "February 16 Super Test lowered its price to 22.9 cents for its regular gasoline and 25.9 cents for ethyl. Then, after several major suppliers reduced their tank-wagon price, Sun dropped its tank-wagon price to all of its dealers in the area" (R. 357).

The complaint in this case was filed on September 26, 1956, in two counts, the first charging price discrimination in alleged violation of the Clayton Act, and the second count charging a price fixing agreement with McLean in alleged violation of Section 5 of the Federal Trade Commission Act (R. 2). Respondent's answer in part asserted that, in giving a lower price to

the one dealer, Sun was meeting its competition and also enabling McLean to meet his competition, all of which was justified by the meeting competition proviso of Section 2(b) of the Robinson-Patman Act (R. 7). The hearing examiner found respondent to have committed both offenses (R. 12); the Commission adopted the Examiner's findings and conclusions and a broad order, embracing the marketing of all of respondent's products, including such diverse commodities as crude oil, petro-chemicals and automobile supplies, at all levels of distribution (R. 34). In reversing and setting aside the order on both counts, the court below found it unnecessary to consider the claim that the order was too broad.

The petition for certiorari did not seek review of the holding of the court below as to the price fixing count. The uncontested holding of the court below that the respondent and McLean did not enter into a price-fixing agreement is one of the operative facts in the consideration of the issue before this Court.

The Commission held that "the discount given by [Sun] to McLean was not made to meet a lower price made to the latter by another supplier"; that "it was given to enable McLean to meet the competition of the Super-Test station across the street"; that the proviso "has reference to the good faith meeting of competition of the seller, rather than that of the buyer" (R. 38).[3]

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[3] In this Court the Commission takes the flat position that "the defense is available only to a seller who seeks to meet a price that has *actually been offered to a buyer* by a competitor of the seller" (Brief, p. 20; emphasis added)—a view that goes far beyond the claim that a seller can only meet competition at his own level. This extreme view, interestingly enough, is not shared by the hearing examiner who decided this case below. See the brief amicus curiae of National Oil Jobbers Council, Inc., Point II.

The Commission went on to instruct respondent that it might avoid unlawful price discrimination if it reduced its wholesale price to "all" dealers, or abandoned sales to dealers and substituted company operation of service stations.

The court of appeals held that the proviso to Section 2(b), like Section 2 generally, lacked plain meaning and required interpretation, and that the decisions of this Court supported that conclusion. In appraising the divergent interpretations made possible by the language of the proviso, the court below resorted to the basic aims of the antitrust laws, and found that they would be frustrated by the Commission's narrow interpretation. The court below recognized that the economic realities in the marketing of gasoline to the motoring public brought it about that suppliers of branded products compete with each other for the motorists' business; that suppliers like respondent, who market branded gasoline through dealers, were dependent on the preservation of those dealers as outlets or channels of competition; that such a supplier could be as effectively deprived of a dealer by price raids which would drive him out of business and take over his customers, as by offering him a lower wholesale price; and that to give price assistance to a dealer whose sales of respondent's branded product were depleted by a price raid by a competing chain retailer, was to preserve market competition and tend to further the basic aims of the antitrust laws.

For these reasons the court below found that the narrow interpretation by the Commission of the words of the proviso was not consistent with the discernible intent of Congress.

## SUMMARY OF ARGUMENT

The interpretation of the proviso and its application to this case by the court below are based on a number of conclusions by that court which rest on undisputed evidence as to the nature of competition in the marketing of gasoline. Competition for the gasoline business of motorists who buy their gasoline from service stations is primarily a competition among the respective products of the suppliers. Gasoline flows from the supplier to the motorist's tank unchanged by the retailer, who serves with the supplier as a channel of supply, competing with similar channels or units of competing suppliers and dealers.

Respondent and its Sunoco gasoline competed with other branded gasolines in Jacksonville, and, at 19th and Pearl Streets, with Super Test, for the custom of the motoring public.

### I

By force of the competitive and economic realities, the equally low price in this marketing context was the price which had been previously posted by Super Test. The "lower price" within the meaning of the proviso was the price Sun had to give its dealer McLean to enable him to post the price for Sun's product which he deemed necessary to meet Super Test's price. In the light of this Court's decisions interpreting the Clayton Act and the broad aim of the antitrust laws, the purpose of Congress can be fulfilled only if protection of the proviso embraces these prices.

The Commission's argument in effect concedes that if Super Test had offered to sell gasoline to McLean at 1.7¢ a gallon less than he was paying Sun, the latter could have discriminated against other Sun dealers in

Jacksonville and met that offer by a price reduction to McLean. If this had happened, the other Sun dealers would have been injured just as much or as little as the record shows. But if, without such an offer, Super Test sets out to take McLean's customers for Sun's product by destroying McLean through deep price cuts, the Commission would deprive Sun of a right to provide the same measure and extent of price assistance. In the first case McLean is preserved as an independent businessman through price assistance by respondent, and, we will assume, other Sun dealers in Jacksonville sustain an injury. In the second case McLean is destroyed, and market competition is *pro tanto* eliminated, because the respondent is not free to give him the same amount of assistance. Such a result is not dictated by legislative history, by the decisions of this Court, or by the basic aims of the antitrust laws.

The Commission's interpretation of the proviso would have it apply only where Super Test made an offer to McLean. But in this industry such offers are not made. Suppliers compete for the business of motorists through retail outlets, and not by offering lower prices to a dealer handling another brand of gasoline. The Commission's argument is in essence that the proviso in Section 2(b) was not intended to apply to this kind of marketing and this kind of competition. But nothing in the statute conditions the availability of the proviso on an offer by a marketer like Super Test to a dealer like McLean. In the *Standard Oil* case this Court, in describing the core of the defense, carefully stated that "wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231, 242.

The language of the statute is in terms of meeting an equally low price, not of meeting an offer.

The solutions offered by the Commission where the price cuts of a Super Test threaten to destroy a supplier's dealer outlet, are to "meet such competition at the dealer level by non-discriminatory reductions in price to all dealers, or by operating its own stations. * * *" (R. 24, 38). These suggestions would defeat the aims of the statute and, indeed, of the antitrust laws generally.

McLean needed help against the price cutting of a more powerful competitor, the Super Test chain, which, operating its own stations, "could fix any retail price it pleased," as the court below found, while McLean's price depended on Sun's price to him (R. 355). McLean could get help from Sun and only from Sun. If, however, Sun must reduce its price to all dealers to be able to help McLean without violation of the Clayton Act, then Sun must lower its price for thousands or millions of gallons of gasoline sold through other dealers, in order to save the income it might derive from sustaining McLean's ability to sell an infinitely smaller volume of gasoline. Respondent failed in its effort to save McLean, by not helping him soon enough, but if it could not make such an effort unless it gave a general price reduction to all dealers, then the selective destruction of the McLean is made easy, for a general price reduction could not be justified as prudent business judgment.

The court below concluded that if Sun reduced its price either to all dealers in Jacksonville, or to all of its dealers in the United States, other oil companies, majors and non-majors, would have to meet Sun's price

cuts, thereby spreading price wars and subjecting the margins of filling station operators to further compression. A price war may or may not result from individual assistance to a single dealer. The Commission's view ensures one and the harm it works on independent dealers.

Nor are these the only defects in the suggestion made in the Commission's decision that Sun meet its competition at 19th and Pearl Streets by lowering its price to "all" dealers. No matter where a line is drawn the Commission can be expected to point to a dealer across the street, or down the road, or in an adjoining town, as being discriminated against contrary to Section 2(a). If, in such circumstances, a seller must give to "all" its dealers a general uniform price cut, there is no geographic limit less than its entire market area which can be delimited with assurance. For wherever it drew the line, Sun would not have available to it the meeting competition defense of the Section 2(b) proviso because, under the Commission's view, Sun would still be meeting only McLean's competition and not its own; accordingly, without the benefit of the proviso, a supplier must reduce its prices to all of its dealers, everywhere, to be free from the thrust of Section 2(a).

A price response wider than the exigencies of the individual competitive situation but narrower than the entire market area served by a supplier may refute the good faith of the price reduction and thereby deny the defense granted by Section 2(b). The proviso places emphasis "on individual competitive situations rather than upon a general system of competition." *E. Edelmann & Co.*, 51 F.T.C. 978, 1006-1007 (1955). The record shows that in December 1955 only McLean appeared to be affected by Super Test's pricing, and there

is no suggestion whatsoever that Sun did not in good faith limit the geographical area in which it lowered its price (R. 54, 100, 130-1, 151, 188, 224, 357).

The other solution of the Commission to the task of interpreting the proviso in the context of this case is to conclude that Congress preferred company operation of service stations rather than an effort like respondent's to preserve a small businessman. The court below pointed out that "the natural effect of the Commission's holding will be to push already highly-integrated majors into combining direct retailing with their other operations—*to the detriment of non-majors, such as Super Test, as well as to the detriment of filling station operators*" (R. 373). The elimination of the independent gasoline dealer from the American scene was not the purpose of Congress in its selection of language for the proviso in Section 2(b).

The broad policy of the antitrust laws is furthered by the decision of the court below. In construing this statute in *Standard Oil*, this Court identified competition to be a primary interest of the antitrust laws as a whole; and the Court described the "defense in subsection (b)" of the Robinson-Patman Act as one restricted to "price differentials in *actual competition*." 340 U.S. at 241-2 (Emphasis supplied). The Court concluded: "*Actual competition*, at least in this elemental form, is thus preserved." 340 U.S. at 242 (Emphasis supplied). Thus, this Court saw in the statute a purpose to preserve the fabric of competition, and not the narrow purpose which the Commission derives from a narrow interpretation of "competitor." When to this interpretation there is added this Court's statement in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, that "considerations of fairness * * * must, we think, have been controlling in the draft-

ing of Section 2(b) * * *,", and this Court's conclusion in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 49, that "* * * in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities. * * *," then it is not difficult to conclude that the 2(b) proviso can fulfill these purposes only if it is possible for the McLeans to receive defensive help from their suppliers when attacked by a more powerful chain retailer.

## II

The petitioner's brief treats the issue as one which requires solution of such problems as the liquidation of an alleged "oligopolistic" industrial structure, and finding measures to render harmless an alleged imbalance of relative economic power between suppliers and dealers. But the case made by the record involves only the respondent and a meeting of competition at 19th and Pearl Streets, Jacksonville. The respondent's position is that the proviso was properly interpreted by the court below for this case. Not only is the oil industry not party to this case, but the Commission's attempt at blanket condemnation flouts Section 2(b)'s focus on "individual competitive situations."

The Commission's alternatives to the decision of the court below are grounded upon the mistaken notion that only by these means is it possible to prevent or immunize predatory price cuts (Brief, p. 41 *et seq.*) To this there are two answers. (1) It was not Sun which first cut prices, it was Super Test, and the price cutting was plainly aggressive. The implication of petitioner's brief is that the interpretation of the proviso by the court below enables "big" Sun to act in a predatory

way upon "little" Super Test. But when we note how the need to invoke the proviso arose, the posture of affairs is not "big" Sun versus "little" Super Test, but "big" chain retailer Super Test versus "small" businessman McLean. The proviso, as construed by the court below, permits only defensive action by a supplier in aid of its retailer. If a supplier should in any way go beyond this, it would not have the benefit of the defense. (2) In any event, if the presence of predatory pricing is demonstrable, the law and law enforcement agencies are available to put it down. An artificial, narrow, reality-ignoring construction of the proviso is not necessary.

The construction of the proviso by the court below requires the Commission to look to the substance of Robinson-Patman Act prosecutions; the Commission would look only to surfaces and form. The application of the proviso to the facts of this case encounters competitive and economic realities in the marketing of gasoline. The court below gave effect to them, the Commission ignored them. The result of the decision of the court of appeals is not to create a right to inflict competitive injury; it carries out the purpose of Congress to protect the institution of competition by permitting a supplier to protect itself and its outlet from a price raid. Finally, the decision of the court below makes it possible for small businessmen, singularly dependent on a source of supply, to be preserved as independent enterprisers instead of being eliminated by the integration of supply and distribution functions in their respective suppliers.

Price wars in the oil industry are complex economic phenomena which are not amenable to facile generalization or easy solution. The court of appeals upheld

Sun's temporary price reduction to McLean in the context of the facts of *this case*. It is *this* holding, not the industry-wide conjectures advanced by the Commission's brief, which is the issue before this Court.

## ARGUMENT

### I

### As Construed by the Court Below the Proviso Carries Out the Discernible Legislative Purpose in Harmony With This Court's Interpretation of Section 2 of the Clayton Act and With the Broad Policy of the Antitrust Laws.

1. The interpretation of the proviso and its application to this case by the court below are based on a number of conclusions by that court which are the premise of the respondent's argument. Those conclusions in part rest on undisputed evidence as to the nature of competition in the marketing of gasoline.

Competition for the gasoline business of motorists who buy their gasoline from service stations is primarily a competition among the respective products of the suppliers (R. 370-373). The economic functions performed by each supplier through its dealers bring this about. Thus suppliers of gasoline must maintain the bulk of the stocks needed to insure an ever-available supply to the motoring public through the limited storage facilities of dealers. The supplier is responsible for building and sustaining consumer acceptance of the branded product by which the dealer seeks the custom of motorists. Competing suppliers are in continuous communication with motorists through many advertising media.[4] The supplier makes the product

[4] Respondent's budget for gasoline advertising directed at the motorist in 1957 was 6 million dollars, or 1/3 of a cent per gallon (R. 211).

available over broad geographic areas, to meet the needs of the motorist's mobility. Gasoline flows from the supplier to the motorist's tank unchanged by the retailer, who serves with the supplier as a channel of supply, competing with similar channels or units of competing suppliers and dealers (R. 213).[5] As a result, respondent and its Sunoco gasoline competed with other branded gasolines in Jacksonville, and at 19th and Pearl Streets with Super Test, for the custom of the

[5] Respondent's vice-president testified (R. 214):

Q. Would you please state specifically who were the sellers of gasoline competing for the business of the motoring public passing 19th and Pearl Streets?

A. The Sun Oil Company through its independent dealer, Mr. McLean, and the Super-Test station through its company-operated station.

Q. Was your company competing for that business with the Super-Test chain only, or with the station as a retailer of Super-Test gasoline?

A. We were competing with the station as a retailer of Super-Test gasoline for the business of the motorist residing or working near that location, 19th and Pearl, and who would find it convenient to stop at that station.

Q. Upon what facts do you base your conclusion that Sun was in competition with the individual Super-Test station across from the one operated by McLean for the business of motorists in that immediate neighborhood?

A. Through the fact that our communication had been direct to the motorists through all the media of advertising which I have mentioned; through the fact that we have neat, attractive service stations distinctively marked; we have dealers that are trained and able to render the kind of service the motorist requires, and of prime importance the fact that we have no other Sun station in the vicinity able to serve the motorist's needs.

n the words of the court below
ompany's product competes with
refiners or suppliers in the motor-
dealer outlets."

hese conclusions, and the competi-
lities, the equally low price in this
s the price which had been pre-
uper Test. The "lower price"
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tain that customer, may in good
price." 340 U. S. 231, 242.

rgument in effect concedes that
fered to sell gasoline to McLean

dissenting in *Standard Oil Company of*
, 337 U. S. 293, 323: "But the retailer
onduit from the oil fields to the driver's
oil companies compete to get the busi-
mer—the man in whose automobile the
etail stations, whether independent or
instrumentalities through which com-
arket is waged."

at 1.7c a gallon less than he was paying Sun, the latter could have discriminated against other Sun dealers in Jacksonville and met that offer by a price reduction to McLean.[7] If this had happened, the other Sun dealers would have been injured just as much or as little as the record shows.[7] But if without such an offer, Super Test sets out to take McLean's customers for Sun's product by destroying McLean through deep price cuts, the Commission would deprive Sun of a right to provide the same measure and extent of price assistance. In the first case McLean is preserved as an independent businessman through price assistance by respondent, and, we will assume, other Sun dealers in Jacksonville sustain an injury. In the second case McLean is destroyed and market competition is *pro tanto* eliminated, because the respondent is not free to give him the same amount of assistance, even though in retrospect, as the court below found, "it would seem impossible to say whether [other

[7] While the respondent did not seek review in the court below of the Commission's finding of competitive injury based on a purported diversion of gallonage (R. 36-8), since the Commission's brief in this Court contains innuendoes that three of the four Sunoco dealers who testified in support of the Commission's complaint were driven out of business by the price assistance given to McLean by respondent (Brief, pp. 11, 48), we think it appropriate to point out that there is no proof of causal relationship between that assistance to McLean and the decisions of these dealers to discontinue operation of their respective stations. Neither the decision of the hearing examiner (R. 12 *et seq.*) nor the opinion of the Commission (R. 34 *et seq.*) suggests that the price assistance to McLean was responsible in any way for the decision of any of these dealers to discontinue operations. Indeed, neither the Examiner's decision nor the Commission's opinion makes any reference to the fact that the three dealers referred to now in the Commission's brief discontinued operation of their stations

Sunoco dealers] suffered a loss of gallonage from Sun's price allowance to McLean or from Super Test's aggressive price cutting" (R. 366). Such a result is not dictated by legislative history, by the decisions of this Court, or by the basic aims of the antitrust laws. In interpreting the proviso the court below wisely was guided by this Court's observation in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 753, that the Robinson-Patman Act clearly "places emphasis on individual competitive situations."

In reality a chain retailer's price may constitute competition for both a seller like Sun and its buyer McLean, which both must meet "or lose the business on which both depend for their common survival."[8] Enforcement of the price discrimination provisions of the Robinson-Patman Act by the Commission has proceeded on the conclusion that under some circumstances a seller in reality steps into the shoes of his customer. In such instances the seller can be meeting in good faith an equally low price of a competitor of both itself and its dealer.[9] De Chazeau & Kahn, in *Integration And Competition In The Petroleum Industry* (1959) at p. 480, point out, as quoted in the opinion of the court below (R. 370): "Most of the evidence seems clearly to demonstrate that a company offers discounts because its dealers are losing business

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[8] See Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), p. 254.

[9] The "indirect purchaser" doctrine of the Federal Trade Commission reasons that customers of a supplier's distributors may be viewed as indirect purchasers of the supplier. The development of the Commission's doctrine is traced in Rowe, *op. cit. supra* note 8, at pp. 57-9. See the Commission's opposition to the petition for certiorari in *American News Co.* v. *Federal Trade Commission*, No. 263, October Term, 1962.

to price-cutting competitors; since the major suppliers compete among themselves and with independents primarily *through* their dealers, the concessions are made in a very real sense in good faith to meet competition. Furthermore, there is little evidence—and certainly none so far in these cases [*Enterprise Industries*[10] and the instant case, then before the Commission]—that the discrimination complained of put a halt to price competition, or even threatened to do so."

The Commission's interpretation of the proviso would have it apply only where Super Test made an offer to McLean. But in this industry such offers are not made. Suppliers compete for the business of motorists, through retail outlets. And the independent dealer is, in the words of the court below, "a rare bird among retail merchants. His business is built around pumps which can be used only for his supplier's gasoline. Sun sells Sunoco in pumps that say 'Sunoco.' Its competitor at 19th and Pearl in Jacksonville, Super Test, sells its gas in pumps that say 'Super Test.' Sunoco gasoline flows unchanged from Sun through Sun pumps to motorists. Sun, not some small retailer, bears the primary responsibility for advertising and for puffing Sunoco against Super Test and other gasolines even though the sales which are competitive take place at the consumer level. McLean's losing fight for survival, therefore, was a lost battle in a long war between Sunoco and Super Test, suppliers, each out to increase its share of the motorists' trade" (R. 371).

A single station in the vicinity of 19th and Pearl Streets sufficed for Super Test, and to enlarge its business it did not undertake to offer its gasoline to Mc-

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[10] 136 F. Supp. 420 (D. Conn. 1955).

Lean, but to take away his customers by deep price cuts. This is the nature of competition in this industry. The Commission's argument is in essence that the proviso in Section 2(b) was not intended to apply to this kind of marketing and this kind of competition. But nothing in the statute conditions the availability of the proviso on an offer by a marketer like Super Test to a dealer like McLean. In *Standard Oil Company* v. *Federal Trade Commission* the facts were that years ago an offer had been made to jobbers who had been purchasing Standard Oil Company's product. But it bears repeating, we think, that the Court in that case (340 U.S. 231 at 242), in describing the core of the defense, carefully stated that "wherever a lawful lower *price* of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower *price*." (Emphasis supplied). The language of the statute is in terms of meeting an equally low price, not of meeting an offer.

3. The solutions offered by the Commission where the price cuts of a Super Test threaten to destroy a supplier's dealer outlet, are to "meet such competition at the dealer level by non-discriminatory reductions in price to all dealers, or by operating its own stations. * * *" (R. 24 and 38). But this Court said in *Standard Oil* that the Robinson-Patman Act does not require a seller to choose "between ruinously cutting its price to all customers . . . or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 250. The Court noted that the seller's price cut would affect competition at the so-called secondary level—the level invoved in this case—and concluded that Congress must have had in mind that inevitably a meeting of compe-

tition would have a multi-level effect. Congress, with this awareness, described a multi-level offense in Section 2(a) and it is reasonable to conclude that it meant the "meeting competition" justification to be co-extensive with the offense.

What the court below preserved by its construction of the statute is not some privilege to discriminate with impunity, but the values for market competition which can be safeguarded by a defensive meeting in good faith of a competitive assault. If one situated as the respondent cannot enjoy the protection of the proviso except by reducing prices to all of its dealers in order to save a McLean from destruction, this would not only have the practical effect of eliminating the protection of the proviso for such marketers,[11] but would defeat important objectives of the antitrust laws and aims of the Commission.

(a) McLean needed help against the price cutting of a more powerful competitor, the Super Test chain, which, operating its own stations, "could fix any retail price it pleased," as the court below found, while McLean's price depended on Sun's price to him (R. 355). McLean could get help from Sun and only from Sun. If, however, Sun must reduce its price to all dealers to be able to help McLean without violation of the Clayton Act, then Sun must lower its price for thousands or millions of gallons of gasoline sold through other dealers, in order to save the income it might derive from sustaining McLean's ability to sell

[11] The court below observed that for an oil company marketing gasoline through filling stations owned or leased by the operators and competing with a supplier-retailer, the practical effect of adopting the Commission's view is to excise from the Act the defense of meeting competition (R. 370).

an infinitely smaller volume of gasoline. Under such circumstances a marketer cannot be expected to provide help to a dealer, and so a small businessman, for whom the Commission's brief repeatedly expresses concern, will be put out of business.

The Commission urges that the purpose of Congress in enacting the Robinson-Patman Act was to "strengthen the protection of small business" and to enhance the ability of enforcement agencies to deal with "localized price-cutting by a large firm for the purpose of driving a smaller firm out of business" (Brief, p. 32). We agree, and point out that "big" Super Test was making deep price cuts to drive "small" businessman McLean out of business. It is not Sun's competitor that is out of business, but Sun's outlet. Respondent failed in its effort to save McLean, by not helping him soon enough, but if it could not make such an effort unless it gave a general price reduction to all dealers, then the selective destruction of the McLeans is made easy, for a general price reduction could not be justified as prudent business judgment, or, as we shall now attempt to show, a step free from the risk of violation of law.

If a marketer confronted by the situation such as pressed upon the respondent must accompany price assistance to a single besieged dealer by a general uniform price cut to all dealers, a general price war, hurtful to independent dealers over a large area, is inevitable. The court below concluded that if Sun reduced its price either to all dealers in Jacksonville, or to all of its dealers in the United States, other oil companies, majors and non-majors, would have to meet Sun's price cuts, thereby spreading price wars and subjecting the margins of filling station operators to

further compression.[12] A price war may or may not result from individual assistance to a single dealer. The Commission's view ensures one and the harm it works on independent dealers, amongst others.

"Nor are these the only defects in the suggestion made in the Commission's decision that Sun meet its competition at 19th and Pearl Streets by lowering its price to all dealers. No matter where a line is drawn the Commission can be expected to point to a dealer across the street, or down the road, or in an adjoining town, as being discriminated against contrary to Section 2(a). If, in such circumstances, a seller must give to "all" its dealers a general uniform price cut, there is no geographic limit less than its entire market area which can be delimited with assurance. For if Sun limited its price reduction to Jacksonville alone, Sun dealers elsewhere in Florida, and in the United States, would be charged higher prices and this would be discriminatory under the Commission's theory. The effect on competition, if any, might be at a different competitive level (see *Anheuser Busch, Inc.* v. *Federal Trade Commission*, 265 F. 2d 677 (C.A. 7, 1959), reversed 363 U.S. 536; *Gerber Products Company* v. *Beech-Nut Life Savers*, 160 F. Supp. 916 (S.D.N.Y. 1958)). Sun would not have available to it the meeting competition defense of the Section 2(b) proviso because, under the Commission's view, Sun would still be meeting only

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[12] In *Enterprise Industries* v. *Texas Co.*, 240 F. 2d 457, 458 (C.A. 2, 1957), Judge Learned Hand pointed out: "It is not uncommon in the industry for a filling station to start what has come to be known as a 'gas war': that is to cut the prevailing price of gasoline, which other competing stations must meet by a corresponding cut in order to keep up their sales, *and that makes it important . . . for the producing companies* to reduce their price to their own competing stations." (Emphasis supplied).

McLean's competition and not its own. Accordingly, without the benefit of the proviso, a supplier must reduce its prices to all of its dealers, everywhere, to be free from the thrust of Section 2(a).

Even to guard against a charge of customer-level price discrimination a seller like respondent could not safely limit the geographic scope of its price reduction to a single community. In *American Oil Company*, Docket No. 8183 (June 27, 1962), the Commission found the respondent, a marketer of gasoline through dealers, to have violated Section 2(a) by giving price assistance in a price war to all of its dealers "in and around" Smyrna, Georgia, but not to its dealers "in and around" the nearby town of Marietta, Georgia. In a dissent Commissioner Elman observed (page 13):

> "If American had chosen to give equally large discounts to its Marietta dealers, where could it have safely stopped? Smyrna and Marietta are located along a major north-south highway with gasoline stations in every town along the way. A price cut to any station or group of stations would be bound to affect the sales of nearby stations up or down the road, and if American made its reductions to all stations on this highway there would undoubtedly be effects upon stations located on adjacent and intersecting roads. Under the Commission's theory American's only safe alternative would be to reduce its prices to all of its dealers everywhere. But is the Commission prepared to say that this enlargement of a local brush fire into a nuclear price war would have effects upon competition less injurious than those of the course of action which American actually pursued?"

This alternative to the construction of the proviso by the court below is not one which Congress could

have intended. Congress was plainly concerned with protecting small business. Big price wars, or the price rigidity resulting from price cuts over vast market areas, are not means of protecting it.

Actually, a price response wider than the exigencies of the individual competitive situation, but narrower than the total marketing area of the seller, may refute the good faith of the price reduction and thereby deny the defense granted by Section 2(b). For the text of the proviso as well as its legislative history disclose that the actions of the price-cutter determine substantially the extent of a permissible competitive response, both in terms of the price itself and in terms of the geographical area in which the price reduction should be made available. In the same way that the actions of Sun's competitor define the permissible range of price reduction on Sun's part, the competitor's actions determine the permissible area for the price reduction. As the Commission itself has heretofore stated, the proviso places emphasis "on individual competitive situations rather than upon a general system of competition." *E. Edelmann & Co.*, 51 F.T.C. 978, 1006-1007 (1955). In short, Sun could respond only to the individual competitive situation facing it, or in the Commission's language, Sun's own price reduction must be "geared" to what the price-cutter did.

Consequently, a price cut in one locality could hardly be used as justification for a corresponding price reduction in a competitive area miles away and apparantly unaffected by the initial price cut. Indeed, the Act's legislative history records that precise example as defining the outer perimeter of a defensive price reduction. Thus, the congressional debates include the following illustration by Congressman Utterback, Chairman of the House Conference Committee:

"To illustrate: The House committee hearings showed a discrimination of 15 cents a box granted by Colgate-Palmolive-Peet Co. on sales of soap to the A. & P. chain. Upon a complaint and hearing before the Federal Trade Commission, this proviso would permit the Colgate Co. to show in rebuttal evidence, if such were the fact, an equally low price made by a local soap manufacturer in Des Moines, Iowa, to A. & P.'s retail outlets in that city; but this would not exonerate it from a discrimination granted to A. & P. everywhere, if otherwise in violation of the bill." 80 Cong. Rec. 9418 (1936).

So here, Super Test did not cut its price in every competitive area in which Sun had a dealer. Instead, Super Test concentrated its price cutting on the single dealer located at 19th and Pearl Streets. Sun could not "in good faith" meet that price by lowering its own prices across the board in areas apparantly in no way affected by what Super Test did. While the good faith part of Section 2(b) obviously permits some margin of error in meeting a price cut by a competitor, it is nonetheless clear that at some point a plainly greater than necessary response would negative the existence of a good faith meeting of competition. The record shows that in December 1955 only McLean appeared to be affected by Super Test's pricing, and there is no suggestion whatsoever that Sun did not in good faith limit the geographical area in which it lowered its price (R. 54, 100, 130-1, 151, 188, 224, 357).

Yet, by reason of a distorted reading of the statute the Commission insists that Sun had to lower its price in a much wider, but undefined, area even though there was no apparant competitive reason for doing so. If the Commission seriously believed that Sun's price reduction was not "geared" to the price-cutting of Super

Test, it never alleged that to be the case nor did the Commission adduce any evidence to support such an allegation.

So long as Sun was able to demonstrate its good faith regarding the area in which it lowered its price, no quibble as to the wisdom or success of that decision can justify a strained interpretation of the statute which would retroactively deny the defense to Sun.

(b) The other solution of the Commission to the task of interpreting the proviso in the context of this case is to conclude that Congress preferred company operation of service stations rather than an effort like respondent's to preserve a small businessman. The court below pointed out that "the natural effect of the Commission's holding will be to push already highly-integrated majors into combining direct retailing with their other operations—*to the detriment of non-majors, such as Super Test, as well as to the detriment of filling station operators*" (R. 373). The elimination of the independent gasoline dealer from the American scene was not the purpose of Congress in its selection of language for the proviso in Section 2(b). But this is the thrust of the Commission's interpretation of the proviso, built upon and going beyond the decision in *Enterprise*.[13] The Robinson-Patman Act was enacted

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[13] "The [*Enterprise*] decision, in addition, erects a barrier to backward shifting of the cost of retail price wars. Both this barrier and the stimulus to vertical integration will injure the small businesses which the Robinson-Patman Act harbors. The good faith defense should be read so as to avoid these incongruous results." Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L.J. 935, 942-948.

See also notes approving the decision of the court below, in 75 Harv. L. Rev. 429 (1961); 1962 Duke L. J. 300; 47 Va. L. Rev. 1229 (1961); 62 Col. L. Rev. 171 (1962).

in a period of apprehension as to the prevailing tendency toward concentration in industry, specifically as to retail chain operation, as represented here by Super Test. Even the petitioner points out (Brief, p. 42) that "Representative Patman, in the course of explaining why it was necessary to limit the very proviso at issue in this case, said 'One of the objects of the bill is to * * * prevent the large corporate chains from selling below cost in certain localities, thus destroying the independent merchants, and making it up at other places where their competitors have already been destroyed' (80 Cong. Rec. 8235)." It was stated in the House that "there is no question but that the sentiment of the country favors the retention wherever possible of the independent merchant and local ownership, and the enactment of this legislation will go far as Congress can in a legitimate effort to bring this about." 80 Cong. Rec. 10745. Congressman Patman stated that the bill was "designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves and the manufacturer from whom he buys, from exploitation by his chain competitor." 79 Cong. Rec. 9078. See also Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* (rev. ed. 1953, American Law Institute) pp. 6-11 and H. Rep. No. 2287, 74th Cong., 2d Sess., pp. 7-8.

This case involves the protection of a small independent merchant, McLean, from the aggressive price raid of the Super Test chain. By directly encouraging the elimination of the independent gasoline retailer, the position of the Commission is in direct conflict with the very purposes for which the Robinson-Patman Act was enacted. *Cf.* Mr. Justice Douglas' dissent in *Standard Oil Company of California* v. *United States*, 337 U.S.

293, 319-321; see also Mr. Justice Jackson's statements, concurred in by Mr. Justice Burton and Mr. Chief Justice Vinson, 337 U.S. at 323-324.[14]

No such perverse results flow from the construction of the proviso by the court below. That construction serves to strengthen the independent gasoline dealer in competing with other dealers and with large chains of

[14] The petitioner's brief comments, by reference, to a 1959 federal district court decision, that respondent at one time engaged in direct service station operation and shifted to dealer operation because of the enactment of chain store tax and social security legislation. Assuming that those comments may be judicially noticed as relevant facts here, they do not establish that a resumption of company operation is unthinkable. The need to reduce prices everywhere to save dealers from selective, progressive destruction might well prove to be an economic influence far outweighing the factors which the Commission asserts would deter such action. As noted above, four justices of this Court have not considered a return to company operation in this industry to be unthinkable.

Mr. Justice Douglas in his dissent in *Standard Oil Company* v. *United States*, 337 U. S. at p. 320, forecast that a narrow construction of Section 3 of the Clayton Act sets the stage for oil companies, as one alternative course of action, to turn to "the use of the 'agency' device, which in practical effect means control of filling stations by the oil companies * * *". The use of agency is growing. Two Federal Trade Commission proceedings attacking its use are pending. *Atlantic Refining Co.*, Docket No. 7471; *Sun Oil Company*, Docket No. 6934. In the last cited prosecution the hearing examiner's finding that this respondent violated the Federal Trade Commission Act by offering and then entering into agency contracts with all of its dealers in the Norfolk, Virginia, market area to meet price war conditions, is based on a record which includes evidence that respondent assisted all dealers in the area in this manner because respondent's assistance to McLean alone had been, a few weeks before, attacked by the Commission's complaint in this case. See also *Simpson* v. *Union Oil Co. of California*, 1961 Trade Cases, par. 69,936 (N.D. Cal. 1960). Contrary to the implication of the Commission's argument here, there is evidence that oil companies are willing to assume the responsibilities and larger costs of retail selling.

stations. It provides a legal de-
nomic defense. Because it is so con-
se cannot be invoked to permit a
for the purpose of predatory expan-
position. The courts have found no
uishing between the two.[15]

court below preserves values which *Enter-*
*s Co.*, 136 F. Supp. 420 (D. Conn. 1955),
mission (Brief, pp. 15 and 28) as expressing
ot take into account. Moreover, "by nar-
ion 2(b), the decision [*Enterprise*] aggra-
wars on retailers who are forced to cut
their volume of sales * * * [such a deci-
prohibit suppliers from lowering their
their retailers meet a competitor's price
prevent retail prices from being driven as
occur, the full amount of these price cuts
the dealer's profit margin. And since the
ler to meet price cuts normally acts as a
price-cutting * * * [such a decision] may
such practices." *Note, The Good Faith*
*n-Patman Act: A New Restriction Ap-*
35, 941-942.

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rcuit in *Balian Ice Cream Co.* v. *Arden*
6 (C.A. 9, 1955), cert. den. 350 U. S. 991,
of the proviso by the court below, and not
ion. See to the same effect *American Co-*
*tion* v. *Anchor Serum Co.*, 153 F. 2d 907
n. 229 U. S. 721 (Seller has right to be
its wholesale price to its retailers so that
the lower resale prices of their retail com-
*her Products Company* v. *Beech-Nut Life*
(S.D.N.Y. 1958).

4. The broad policy of the antitrust laws is furthered by the decision of the court below. Since the legislative history of the proviso is of little help in ascertaining who Congress thought to be competitors, the policy of the antitrust laws, to which Congress appended the Robinson-Patman Act, increases in importance as an aid to interpretation. The basic aims of the antitrust laws are particularly illuminating when, as here the problem is "not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind if the point had been present." Gray, *Nature and Sources of the Law*, p. 173 (2d ed., 1927).

The Commission's brief (at pp. 31-32) asserts that economic and policy considerations should not be resorted to for the purpose of construing the Robinson-Patman Act, despite this Court's treatment of the Act as one requiring such resort in *Standard Oil v. Federal Trade Commission*, 340 U.S. 231. The Commission's brief then proceeds to make the remarkable argument that the external policy considerations to be regarded are that Section 2 "may fairly be viewed as incorporating a congressional policy similar to that of the social security, wage-and-hour, collective bargaining and other social legislation whose primary effects Sun and the other major oil companies have sought to avoid by withdrawing from direct retail operations * * *" (Brief, p. 32, note 19). How it would have promoted the small business aims of the Robinson-Patman Act if Sun had not withdrawn from direct retail operations is not explained, and we suggest that it would not further those aims for Sun and other oil companies to now withdraw from marketing through independent dealers.

When it turns its attention to the broad policy of our antitrust legislation the Commission's argument overlooks the fact that this Court identified "the heart" of our national economy policy in passing upon this very statute in *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231, 248:

> "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition which it sought to protect, and monopoly, which it sought to prevent.' *A. E. Staley Mfg. Co.* v. *Federal Trade Commission* (C.A. 7th) 135 F. 2d 453, 455."

The narrow meaning which the Commission would give to the word "competitors" in the proviso to Section 2(b) disregards this Court's emphasis on competition. Not only did this Court identify competition to be a primary interest of the antitrust laws as a whole; this Court also described the "defense in subsection (b)" of the Robinson-Patman Act as one restricted to "price differentials in *actual competition*." 340 U.S. at 241-2 (Emphasis supplied). The Court proceeded to describe the core of the defense, as quoted *supra*, p. 18, and concluded: "*Actual competition*, at least in this elemental form, is thus preserved." 340 U.S. at 242 (emphasis supplied). Thus this Court saw in the statute a purpose to preserve the fabric of competition, and not the narrow purpose which the Commission derives from a narrow interpretation of "competitor."

When to this interpretation of the Robinson-Patman Act in *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231, there is added this Court's

statement in *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, that "considerations of fairness * * * must, we think, have been controlling in the drafting of Section 2(b) * * *," and this Court's conclusion in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 49, that "* * * in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities. * * *",[16] then it is not difficult to conclude that the 2(b) proviso can fulfill these purposes only if it is possible for the McLeans to receive defensive help from their suppliers when attacked by a more powerful chain retailer.

5. The primary reliance of the petitioner, in attempted avoidance of the force of the foregoing considerations, is that the proviso has a plain meaning, and that the plain words of the statute, taken in their normal and customary meaning, make the defense set up by the 2(b) proviso available only to a seller who "seeks to meet a price that has actually been offered to a buyer by a competitor of the seller * * *." (Brief, p. 20 *et seq.*) The court below concluded that the language of Section 2(b) was imprecise enough to support divergent interpretations as to the meaning of the proviso.[17]

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[16] A gasoline dealer cannot accumulate an inventory of gasoline when prices are low, for the tanks of a service station are limited capacity (R. 371). A chain retailer like Super Test can take advantage of quantity buying and its price advantages.

[17] The Commission argued in the court below that "the plain wording of the proviso * * * has reference to the good faith meeting of competition of the seller * * *"; respondent claimed that it came "within the scope" of the proviso in that Super Test was a "competitor" of respondent (R. 369).

The proviso in Section 2(b) is part of a statute which this Court has said is not noted for "precision of expression," and Section 2(b) itself has been described by this Court as being couched in "infelicitous language."[18] For want of plain meaning the Court found it necessary to search out and give expression to the meaning of the proviso in *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231. There the Court, among other sources, looked to "widespread understanding" that the proviso sets out "a complete defense," 340 U.S. at p. 246, and the Court referred to the reflection of that understanding in actions and statements by members and counsel of the Federal Trade Commission.[19] The Court extended

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[18] *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 65. Mr. Justice Jackson, dissenting in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 482, 494, said of the price discrimination law that it was "complicated and vague in itself and even more so in its context. Indeed the Court of Appeals seems to have thought it almost beyond understanding."

Section 2 as a whole is marked by ambiguities and inadvertent gaps which have resulted in interpretations of a far reaching nature. For example, in *United States* v. *Borden Co.*, 370 U.S. 460, 468, the Court noted that the cost justification defense was "literally susceptible" of one construction, but adopted another construction more consonant with the legislative purpose. In *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92, 96 (C.A. 2, 1962), the court observed that the omission of "buyers" from the literal terms of Section 2(d) was more " 'inadvertent' than 'studious' ". See also *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365, 369 (C.A. 2, 1958) ("of like grade and quality" inserted in Section 2(d)); *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132, 133, 134 (C.A. 2, 1946), cert. denied, 331 U.S. 806 ("engaged in commerce" inserted in Section 2(e) and "purchasers" in Section 2(d) modified by "competing").

[19] Even as the position of the Commission in *Standard Oil Company* v. *Federal Trade Commission* was a departure from "a widespread understanding * * * reflected in actions and statements of members and counsel of the Federal Trade Commission" (340 U.S.

its earlier consideration of the legislative history of the proviso, made in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, and concluded (340 U.S. at 247, note 14) that "we find that the legislative history, at best, is inconclusive." It is equally inconclusive on the precise question before the Court in the present case.[20] Here, as was true in *Standard Oil*, there is need to "reconcile" with "broader anti-trust policies" language marked by indeterminate generalities. *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 73, 78.

The words of this statute hardly have, as the Commission's brief claims (p. 21), a "normal and customary meaning." *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 388. Otherwise this Court would not

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at 246), so also the complaint of the Commission in the present case and the Commission's position taken in this Court depart from a policy of the Commission that price allowances such as Sun made to McLean enjoy the benefit of the proviso to Section 2(b). The court below noted that the Commission "has changed sides on the issues." (R. 379). The price assistance to McLean was given when the Commission's view was that the meeting competition proviso could be invoked in circumstances such as confronted the respondent at 19th and Pearl Streets, Jacksonville.

The Commission's change in position is treated more fully in the brief amicus curiae filed herein by Texaco, Inc.

[20] The Commission's reading of the legislative history fails to differentiate the history respecting Section 2(a) from that relating to Section 2(b) (Brief, pp. 25-28). The history of the amendments reviewed by this Court in *Standard Oil* and *Staley* indicates that Congress, in adopting the Robinson-Patman amendments, had a purpose to *enlarge* the offenses previously described by the Clayton Act, by curbing not only sellers, as before, but also the predatory use of power by chain stores and large buyers. *Cf.* Federal Trade Commission, *Final Report On the Chain Store Investigation* (1934) p. 57 *et seq.* As this Court pointed out in *Standard Oil* (pp. 241-42), "none of these changes, however, cut into the actual core of the defense."

have had to search for its meaning in *Staley, Automatic Canteen,* and *Standard Oil.*

In further development of its "plain meaning" contention, the Commission argues (Brief, pp. 22-23) that the phrase "equally low price" in the Section 2(b) proviso would seem to import "identity between the discriminatory price and the competitive price * * *" Hence, the Commission concludes that this phrase would make sense only if the proviso were limited, as the Commission urges, to instances where "a seller's competitor offers his potential customer a low price," i.e. where Super Test should offer McLean a low price. This is so, the Commission urges, because "It is impossible to imagine a realistic situation in which there would be any legitimate economic advantage for a seller to sell to his buyer at a price equally low to that offered by the *buyer's* competitor (e.g. for a manufacturer to sell to a retailer at the same price being offered to consumers by the latter's retail competitor)." But the Commission's premise is not sound, and the conclusion does not follow. In the first place, in *Standard Oil* this Court did not construe "equally low" to mean identity of prices. The Court noted there that the company "sought to show that it succeeded in retaining these customers, although the tank-car price which it offered them *merely approached* or matched, and did not undercut, the lower prices offered them * * *" *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 238 (emphasis supplied). This Court held that proof of a discriminatory price concession not identical to the "equally low price of a competitor" was an absolute defense. If the position urged here by the Commission should be adopted, a seller's help to his customer

could be illegal if it did not discriminate enough, i.e., if it was less than enough to make for identity of prices. Such narrow literalness is not the "normal" and "customary" meaning of the words Congress used in the context in which they are found. In the second place, the question whether "equally low price" imports "identity between the discriminatory price and the competitive price" is totally unrelated to the conclusion sought to be drawn by the Commission. When, for the purposes of the meeting competition proviso, the competitive retail prices are compared, the problem suggested by the Commission disappears.

The Commission's enforcement of Section 2 of the Clayton Act discloses that the Commission itself has taken "equally low price" to have something other than a literal meaning. Thus, where one seller's products sells at a premium because of consumer acceptance of the brand, the Commission holds that equally low price means the maintenance, not of price identity, but of an established, prevailing price differential. If this differential is narrowed, or eliminated, then, in the view of the Commission, there is no meeting of the equally low price.[21]

The "plain meaning" argument asserts further (Brief, pp. 23-4) that it is necessary to torture the words of the proviso into an artificial meaning if Super Test's posted price for gasoline is to be taken as the equally low price met by Sun's price to McLean. Sun's

[12] *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 302 (1957), rev'd on other grounds, 289 F. 2d 835 (C.A. 7, 1961); *American Oil Co.*, F.T.C. Docket 8183 (June 27, 1962); *Corbey Products Co. v. Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916, 920-921 (S.D.N.Y. 1958). *Cf. Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, 236 (C.A. 2, 1929), cert. denied 279 U.S. 858.

assistance to McLean was to enable him to post a price he selected to restore Sun's gasoline to a competitive position in which Sunoco gasoline would meet the competition of Super Test gasoline. The Commission's attack on this price assistance presents a problem of statutory construction in the light of all relevant facts, but the existence of the problem does not convert a vague statutory provision into one having a plain meaning.

No issue is before the Court in this case as to whether Sun's purpose was merely to meet, or to undercut, the price of Super Test. The court below reversed a Commission finding that the purpose was to undercut, and the Commission is not seeking review of that ruling (Brief p. 25, note 17). But it is argued by the petitioner, as a reason for its narrow reading of the proviso, that under the interpretation of the court below there would be no objective basis for deciding whether a seller's price to a retailer was merely to meet a competitor's retail price. The burden is on the respondent in a proceeding under the statute to establish the defense, including a good faith purpose to do no more than meet a competitor's price. If a respondent cannot present evidence sufficient to establish that such was the purpose and effect of a discriminatory price, he will fail. But because this is a matter to be proved is not to suggest, as the Commission claims, that Congress could not have intended the 2(b) defense to be available. If a supplier does no more than give defensive price assistance to its local dealer to enable that dealer to post a price that *he* determines, a price which is demonstrably no more than necessary to meet an existing lower price of a competitor, the element of meeting competition in good faith is clearly established.

## II

**The Choice of the Court Below Between Divergent Interpretations of the Proviso and the Court's Application of the Proviso to This Case Produce a Result in This Case Consistent With Law and the Economic Realities.**

1. The petitioner's brief seems to be arguing a case against the petroleum industry. It treats the issue as one which requires solution of such problems as the liquidation of an alleged "oligopolistic" industrial structure and the finding of measures suitable to render harmless an alleged imbalance of relative economic power between suppliers and dealers. But the case made by the record involves only the respondent and a meeting of competition at 19th and Pearl Streets, Jacksonville. The respondent's position is that the proviso was properly interpreted by the court below for this case.[22]

The brief of the petitioner recognizes that the problem "is one of making difficult choices in an imperfect world" (p. 37). But it is not necessary to augment that difficulty by seeking a solution *here* and *now* for what the brief of petitioner describes as a "petroleum

[22] In *Bayer Printing Co. v. Local 731, Brotherhood of Painters*, 281 U.S. 462, 473, Mr. Justice Holmes said, for this Court that it does not "go into general propositions or prophetic statements of how it is likely to act upon possible or even probable issues that have not yet arisen". In *The Bradley Local No. 111 v. Wisconsin Employment Board*, 315 U.S. 740 the Court refused to go beyond the precise issue before it, holding (pp. 746-7): "We deal, however, not with theoretical disputes but with the concrete and specific issues raised by actual cases * * *". In *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395, the Court again emphasized its often stated practice in antitrust cases to let "[t]he varying circumstances of each case determine the result * * *." More recently, in *Federal Trade Commission v. Anheuser-Busch Co.*, 363 U.S. 536, 554, the Court commented that "our interest is solely with this case * * *" in construing and applying Section 2(a) of the Clayton Act.

industry characterized by retailer subservience to major refiners" and "oligopolistic price control and identity * * *" (p. 59). The oil industry is not on trial here notwithstanding the undocumented and imaginary sins attributed to it by the Commission's brief. Not only is the oil industry not party to this case, but the Commission's attempt at blanket condemnation flouts Section 2(b)'s focus on "individual competitive situations."

Lest any doubt exist on this score, the record here as well as common experience disprove veiled charges of predation. Gasoline prices reflect whatever the various sellers in the particular market have learned they can get without losing business to their competitors. A price reduction by one or more sellers, which is not followed by their competitors, will result in a loss of business to those sellers who did not lower their prices. For this reason, a seller's freedom over his own prices is circumscribed by the consumer's willingness to pay the price asked and his knowledge of prices available elsewhere.

Sometimes a seller finds himself in a so-called price war. He is forced to sell his gasoline at exceptionally low prices if he wishes to remain in business, for even in this abnormal situation market forces work with inexorable logic. As noted elsewhere herein, Judge Learned Hand said of the initiation of a price war that:

> "other competing stations must meet (price cuts) by a corresponding cut in order to keep up their sales; and that makes it important, if indeed not necessary, for the producing companies to reduce their prices to their own competing stations." *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F. 2d 457, 458 (C.A. 2, 1957).

Price wars do occur in the marketing of gasoline, but price wars are explainable by a variety of factors other than predation. There is not the slightest suggestion here that Sun's price reduction was even tinged with predatory motives. To be sure, the Commission's brief attacks the oil industry generally and hints that predatory pricing will go unchecked if the statute is not read the way it wants it to be read. That threat is not only unconfirmed in this record, but it overlooks the statute's requirement of good faith, which cannot be present if the price reduction is prompted by predatory motives rather than a meeting of competition.

The development of the issues here is not aided by arguments in the Commission's brief which depart from this case to argue one not made by the record. Thus the Commission asserts (Brief, p. 40) that a supplier like respondent should not be permitted to "cite the weakness of his dealers as a justification for engaging in selective price warfare. * * *" There is no evidence that in this case the respondent took any step which can be construed as an act of selective price warfare. On the contrary it is plain that Super Test inaugurated a selective price attack, against which respondent sought to defend McLean. Again, it is asserted (Brief, p. 49) that "Sun's purpose was to hold a state of truce with its major competitors while Super Test was being fought * * *". There is no evidence either that competition between Sun and its major competitors had become neutralized, or that Sun was fighting Super Test. The only evidence is that Sun was defending McLean, and itself, from Super Test's attack.

The argument of the Commission reaches out so far as to embrace mere suspicion as a justification for its

interpretation of the proviso. It asserts that "*the possibility* that a localized, discriminatory price cut was, at least to a significant extent, motivated by the purpose to eliminate competition" (emphasis supplied), is greatly increased by the interpretation which the Commission rejects; and then the Commission asserts that Sun's purpose in the instant case is "subject to grave suspicion" (Brief, pp. 44-5), far more so than if its price cut had been given to McLean because another supplier had offered McLean gasoline at a lower price. No evidence is cited to buttress a conclusion of "grave suspicion" or even of the "possibility" referred to in the Commission's brief. The interpretation of this statute for this case neither requires nor warrants resort to unfounded conjectures.

2. We have already reviewed the deficiencies in the two original suggestions of the Commission as to courses of action open to respondent, i.e. the elimination of its independent dealers by further integration in the form of direct marketing to the consuming public, and a rigid, anti-competitive, uneconomic general price reduction to all dealers, which would inevitably lead to price wars and reductions of their margins.

In its brief the Commission makes further suggestions. Thus, it is asserted (pp. 40-41) that a gasoline supplier, and presumably respondent, should refrain from exploiting its dealers and keeping them on the fringe of bankruptcy by providing them with larger margins of profit; then they would have strength to withstand "heated competition." This argument overlooks the fact that respondent functions in a highly competitive world; it does not itself have the power to set wider margins for dealers. McLean's low margin, at all times, price war or no price war, was the result of

the competition of other retail sellers. They determined McLean's price and the fact that his margin was not greater. If Sun should reduce its tankwagon price to make possible a wider margin for all of its dealers, it is not to be supposed that all of them would maintain their existing prices. Some dealers would inevitably seek to capitalize on reduced cost by seeking more sales at a lower price, general retail and wholesale price reductions in the market would soon follow, and the pre-existing margin would be restored. Larger margins could be inaugurated only theoretically, i.e., by a broad illegal conspiracy among all suppliers and retailers.

The threat of bankruptcy for a dealer subjected to a price raid like Super Test's, is the practical consequence of the remaining alternative open to respondent. That course would be to leave McLean to bear the entire brunt of the Super Test attack, to either let his profits disappear by refraining from meeting the Super Test price cut, or to meet the price cut out of his margin. That respondent did not abandon McLean to his own devices simply underlines the marketing reality to be that respondent and its dealers were unified in competing with Super Test for the motorist's business.

This conclusion is confirmed by the Commission's brief. It asserts (p. 39): "Nor was there any basis either in the record or in economic theory for the court's conclusion that a cut in Sun's tank-wagon price to fillingstation operators need cause a 'compression' in their margins * * *." In the first place, continues the Commission, there is nothing to require the dealers to lower their retail prices. But if Sun lowered a posted tank-wagon price, other suppliers would quickly match Sun's wholesale price, and very soon lower retail prices would be a reality in the area. Sun dealers would have

ler to be competitive. Then, turn-
out, the Commission's brief asserts
he dealers will experience compres-
price cut is inadequate to meet the
on it is purportedly designed to
ce wholly within Sun's control:"
e fallacy of this allegation of con-
argument is a clear recognition of
indeed Sun's competition which is
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low enables "big" Sun to act in a
n "little" Super Test. But when
ed to invoke the proviso arose, the
is not "big" Sun versus "little"
g" chain retailer Super Test versus
m McLean. The proviso, as con-
below, permits only defensive ac-
n aid of its retailer. If a supplier

should in any way go beyond this, it would not have the benefit of the defense. (2) In any event, if the presence of predatory pricing is demonstrable, the law and law enforcement agencies are available to put it down. An artificial, narrow, reality-ignoring construction of the proviso is not necessary.

The court below pointed out (R. 379) that the Commission's interpretation of the proviso tends to defeat a broad range of competitive and economic values which the Robinson-Patman Act and the antitrust laws seek to preserve. The arguments of the Commission attacking this conclusion (Brief, p. 45 *et seq.*) largely depend on the assertion that in fact McLean was not saved from elimination, and that a general price war in Jacksonville did in fact follow respondent's assistance to McLean.[23] This amounts to a claim that the construction of the proviso should be influenced by the success or failure of Sun's efforts. If McLean had been preserved in business, that fact would not weigh in favor of the interpretation of the court below. No more is McLean's business demise because Sun's help came too late, a guide to interpretation. As for the general price war in Jacksonville, we have shown *supra* (1) that there is no evidence that it was caused by Sun's help to McLean, and (2) that the court below attributed its inception not to Sun, but to Super Test.

The petitioner's critique of the decision of the court of appeals asserts that that court assumed that Sun

[23] The argument attempts to buttress its criticism of the conclusions of the court below by asserting that that court condones an "attack" by Sun on Super Test (Brief, pp. 49-50). We have pointed out *supra*, that Sun made no attack on Super Test, but merely defended itself from Super Test's attack. Here the Commission comes to recognize that what is involved is a competition between those two marketers.

was meeting an *unlawful* price of a competitor (Brief p. 55). There is no question before this Court as to whether the Super Test price was a lawful one for respondent to meet. There was never any contention below that respondent was attempting to meet an unlawful price, and neither the hearing examiner nor the Commission found the Super Test price to be unlawful for any reason. The opinion of the court below will be searched in vain for any conclusion or assumption that respondent was attempting to meet an unlawful price. This Court has recognized the lawfulness of a seller's selective price reduction in self-defense against "a price raid by a competitor." *Standard Oil Company v. Federal Trade Commission*, 340 U.S. at p. 248. That character of the competitive attack does not put competitors on notice that a sporadic lower price is or may be a full blown predatory pricing violation of some one of many provisions of the antitrust laws, or of Section 5 of the Federal Trade Commission Act. Sun was not told by the hearing examiner or by the Commission, in their respective decisions, to complain to the authorities, but rather to reduce its price to all dealers in response to Super Test's price cuts.

## CONCLUSION

The construction of the proviso by the court below requires the Commission to look to the substance of Robinson-Patman Act prosecutions; the Commission would look only to surfaces and form. The application of the proviso to the facts of this case encounters competitive and economic realities in the marketing of gasoline. The court below gave effect to them; the Commission ignored them. The result of the decision of the court of appeals is not to create a right to inflict competitive injury; it carries out the purpose of Congress to protect the institution of competition by per-

mitting a supplier to protect itself and its outlet from a price raid. Finally, the decision of the court below makes it possible for small businessmen, singularly dependent on a source of supply, to be preserved as independent enterprisers instead of being eliminated by the integration of supply and distribution functions in their respective suppliers.

Price wars in the oil industry are complex economic phenomena which are not amenable to facile generalization or easy solution. The court of appeals upheld Sun's temporary price reduction to McLean in the context of the facts of *this case*. It is *this* holding, not the industry-wide conjectures advanced by the Commission's brief, which is the issue before this Court.

For the above-stated reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted.

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## APPENDIX

Section 2(a) and (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a) and (b), provides in part as follows:

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involve in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the

prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."